USTA appears to suggest that the 180-day time limit on the Commission's dispute resolution may mitigate such problems.[39] But given the evidentiary problems the LECs' proposed hurdles would impose, the time limit merely makes the complaint's proof process more difficult. Moreover, while the 180-day limit may prevent a single proceeding from languishing indefinitely, an OVS operator could readily force repeated such proceedings by responding to a Commission order with partial, inadequate, or delayed compliance, relying on the lack of specificity in the Commission's rules (as the LECs would have them) — or the complaint's heavy burden of proof (as the LECs would impose it) — to excuse such delaying tactics. Even if the Commission refused to let such lack of specificity stand in the way of its duty to prohibit discrimination and ensure reasonable rates, an independent video programming provider would be harmed, perhaps critically, by the associated delay.[40] As their own comments reveal, the LECs have candidly acknowledged that they have every incentive to pursue just such tactics, as long as the Commission's rules permit them.

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[39] See USTA Comments at 11.

[40] The problem would only be exacerbated if the Commission adopted the LECs' suggestion that an OVS operator could force an independent video programming provider to go through mediation or arbitration first, or to participate in alternative dispute resolution processes at the Commission, which even the LECs admit would risk exceeding the 180-day statutory deadline. See Bell Atlantic Comments, Appendix at 7; USTA Comments at 12; NYNEX Comments at 30.

If the OVS rules are to create an efficient market for carriage of independent video programming, they must provide more initial clarity and certainty. As Bell Atlantic et al. themselves admit, the Commission must "clearly articulate the overall approach it will take to resolving disputes" in advance.[41] In practice, this means that there must be clear rules in advance.[42]

Unlike the LECs' approach, the approach suggested in our initial comments is designed to establish the minimal rules necessary to solve the problems. In the specific proposals made in our initial comments, and in the proposed rules attached to these reply comments, we have been as careful as the LECs to avoid unnecessary regulatory requirements. But in order to avoid making detailed specifications as to rates, cost studies, channel allocations, and the like, it has proved necessary to establish certain objective "yardstick" requirements to prevent the LECs from defeating the open access intended by Congress.

We have chosen the standards outlined in our initial comments to be objective and easily verifiable.[43] Strict enforcement of these basic requirements for an OVS, combined with open, public disclosure of carriage contracts and the necessary

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[41] Bell Atlantic Comments at 7. See also id. at 9.

[42] See Time Warner Comments at 20-21, 22-23.

[43] See, e.g., the "yardstick" approach presented in Comments of NLC et al. at 20 (rates presumed reasonable if at least 1/3 of capacity is occupied by at least four independent video programming providers).

reports regarding affiliates,[44] may suffice to prevent LECs from defeating the principle of open access. Of course, it may turn out that these broad general protections are not sufficient to prevent abuses. For this reason, it will also be necessary for the Commission to review the actual results of the OVS rules periodically, as suggested in the attached proposed rules.

2. The OVS operator, which alone has access to the necessary information, must carry the burden of proof.

The LECs seek to place the burden of proof in any dispute on the independent video programming provider.[45] They present, however, no reason for this assignment, other than perhaps their demand that OVS be a cable system in disguise. Once again, the strong and absolute language of the statute — the Commission is required to prohibit discrimination and ensure reasonable rates — militates against any requirement that would place before an independent video programming provider so formidable a barrier to entry.

The cardinal difficulty faced by any independent video programming provider will be that the evidence necessary to prosecute a complaint belongs to the OVS operator, not the independent video programming provider. It follows that the OVS

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[44] See Comments of NLC et al. at 18-20.

[45] See, e.g., Bell Atlantic Comments at 10; NYNEX Comments at 29.

operator must carry the burden of proof.[46] This requirement should streamline the dispute resolution process by making unnecessary the sort of elaborate discovery characteristic of judicial litigation.

If OVS is not to be subjected to detailed, specific regulation, conditions such as the burden of proof must be chosen so that OVS operators will have the correct incentives to promote the goals of OVS, not impede them. In effect, placing the burden on the OVS operator may be viewed as a trade-off for not imposing detailed restrictions or carrying out detailed cost studies. The LECs cannot reasonably expect to have both the benefit of lenient rules and the benefit of no burden of proof.

The procedures proposed by the LECs would be inconsistent with the statute, because they would not permit independent video programming providers to bring complaints with sufficient facility that the rule could be said to prohibit discrimination or ensure reasonable rates. Rather, the rules proposed by Bell Atlantic et al., in particular, appear to be designed to do everything possible to make dispute resolution burdensome for independent video programming providers, and to skew the outcome in the OVS operator's favor. It is striking that out of the seventeen pages of rules proposed by Bell Atlantic et al., ten

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[46] Cf. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 at ¶ 128 (May 3, 1993) (burden of proof placed on cable operator because operator possesses the necessary factual information).

deal with the dispute resolution process, most of these devoted to the erection of a series of hurdles a video programming provider must pass to prosecute a complaint. This extreme disproportion, in rules that are supposed to be designed to protect independent video programming providers, provides a vivid sense of the LECs' priorities (and the likely result if they are allowed to exercise untrammeled "business judgment."[47]

III. AN OVS OPERATOR MUST BE SUBJECT TO STRONG NONDISCRIMINATION AND REASONABLE RATE OBLIGATIONS TO PREVENT OVS FROM BECOMING A CABLE SYSTEM IN DISGUISE.

A. The Commission Must Adopt Strong Rules To Protect Independent Video Programming Providers.

As noted above, the statutory language is unambiguous and absolute: the Commission's rules must protect independent video programming providers from discrimination.[48] The attached proposed rules make the procedural requirements that protect against discrimination (such as the burden of proof) deliberately

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[47] It appears that the LECs may be seeking to set up a standard that would require a complainant to prove that the OVS operator intended to discriminate. See, e.g., Bell Atlantic Comments at 10; NYNEX Comments at 10. Such a requirement has no place in OVS dispute resolution. The statute requires the Commission to prevent discrimination and unreasonable rates regardless of intent, not merely to punish wrongdoers. Thus the proper criterion is not fault, but result: discrimination or unreasonable rates are to be remedied whether or not the LEC intended them (although the Commission would, of course, take intent into account in determining whether to apply the grave remedy of decertification).

[48] 1996 Act, section 302(a) (adding 47 U.S.C. § 573(b)(1)(A)). See also NCTA Comments at 4 n.1; ACE Comments at 3, 9.

strong, and establish a clear objective yardstick to show that rates are reasonable, in order to avoid requiring the Commission to carry out a substantive analysis in each case — for example, a cost-of-service analysis.

1. The LECs Systematically Confuse Markets.

The objections raised by the LECs to reasonable carriage requirements reflect a systematic confusion between the cable-like third of the OVS and the common-carrier-like two-thirds. It is essential to keep in mind that the nondiscrimination and reasonable-rate requirements apply to the OVS operator's relationship with video programmers, not with end-users (subscribers). Thus, for example, Bell Atlantic et al. claim that an OVS operator must follow established cable industry practice in dealing with independent video programming providers.[49] But there is no such cable industry practice, because a cable operator carries no independent video programming providers. Rather, Bell Atlantic et al. are really talking about the OVS operator's own contracts for the programming that it (the OVS operator) provides directly to subscribers — not the OVS operator's carriage contracts with independent video programming providers. Thus, the LECs' analogy fails.

The same confusion is perpetuated in the LECs' discussions of making carriage contracts publicly available and of carriage rates. In fact, two different markets are involved. There is no

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[49] Bell Atlantic Comments at 9-10.

existing market, or any competition, in the area (carriage) to which the statutory requirements apply.[50]

In a similar way, as discussed below, certain LEC arguments confuse the market for carriage with the market for end-users (subscribers). Competing cable operators may share the OVS operator's market as to subscribers, but will provide no realistic competitive alternative for independent video programming providers in the market for access to distribution.

2. Common carriage concepts must be applied to the extent necessary to achieve the objectives of the OVS provision.

In some cases, LECs seek to avoid the requirements of the statute by claiming that such "Title II concepts" cannot be applied to a system not subject to Title II.[51] As pointed out in our initial comments, this is not accurate. OVS operators are subject to the same sorts of nondiscrimination and reasonable rate requirements, with respect to their 2/3 open capacity, as are common carriers, and there is no evidence that Congress intended these terms to have any different meaning in OVS than in Title II.[52] What Congress wished to avoid was a "rigid common carrier regime" that would include the Commission's customer premises equipment and Computer III rules, or would apply Title

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[50] As noted above, leased access has so far failed to engender such a market on cable systems.

[51] See, e.g., NYNEX Comments at 22 & n.53; U S West Comments at 4.

[52] Comments of NLC et al. at 15-18.

II directly to OVS.[53] As evidenced by the language used in the OVS provision, Congress not surprisingly found it necessary to invoke certain common carriage concepts in setting up an open access regime.

We have thus advocated the flexible application of common carriage concepts only where and to the extent necessary to achieve the statute's objectives. Thus, for example, an OVS operator is not subject to the common carrier requirement that capacity be expanded to meet all requests for carriage.[54] On the other hand, the carrier-user relationship may be used effectively to define what counts as an independent video programming provider for purposes of the statutory 2/3 capacity limit.[55] If the carrier-user relationship were not used, it would be difficult or impossible to account for the myriad of devices OVS operators might use to confer preferential treatment on favored, albeit not technically affiliated, programmers.[56]

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[53] See H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 179 (1996) ("Conference Report").

[54] Thus, the statute provides that an OVS operator's obligation stops at the two-thirds limit for however much capacity the OVS operator chooses to build. 1996 Act, section 302(a) (adding new 47 U.S.C. § 571(b)).

[55] See also TCI Comments at 8. Even NYNEX concedes that certain non-ownership relationships, such as exclusive vertical arrangements, can be used to foreclose entry by new entities. NYNEX Comments at 12-13.

[56] See Cablevision Comments at 12.

B. Specific Rules Must Be Drawn to Prevent Discrimination and Ensure Open Access.

1. OVS carriage obligations must enable independent programmers to use capacity readily on the OVS.

The LECs seek to evade the crucial open access requirement of the statute's OVS model in several ways. For example, Bell Atlantic et al. state that the OVS operator is not restricted to one-third of its system capacity if demand is insufficient to fill two-thirds of that capacity.[57] While that may be true, it ignores the obvious: the rules the Commission adopts will determine, to a large degree, how much demand will appear. If OVS operators adopt obstructive carriage policies (as the LECs themselves admit they have every reason to do), and are not restrained by Commission rules, the demand will never materialize in any measurable form, since potential independent video programming providers will quickly become aware (as have potential leased access programmers) that there is no point in pursuing a will-o'-the-wisp. Thus, the Commission's rules must make it possible and practical for demand to develop, or the LECs will become de facto cable operators on their so-called OVS.

Similarly, the LECs float a variety of proposals allowing the OVS operator to freeze an initial channel allocation for long periods of time — on the order of five years.[58] But any such ability on the part of the OVS operator essentially would

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[57] Bell Atlantic Comments at 18.

[58] See, e.g., USTA Comments at 17-18; Bell Atlantic Comments at 21; NYNEX Comments at 9.

transform OVS into a cable system for that period of time, and create a powerful — and improper — incentive for the OVS operator to make sure there is little demand for the 2/3 "open" capacity in the first instance. The potential for discrimination is obvious, particularly where the operative factors are within the OVS operator's control, as with the length of the carriage contracts it enters into. We suggest that the reasonable expectations referred to by the LECs[59] may best be met by preventing the OVS operator from rejecting new independent video programming providers until and unless the 2/3 obligation is fulfilled and by ensuring a free market in resale of channel capacity, as described in our initial comments.[60]

2. OVS rules must require uniform carriage rates.

U S West argues that the Commission need make no rate rules because the market will constrain OVS rates.[61] Here, U S West appears to confuse the carriage market with the end-user or subscriber market.[62] Even if a cable operator competes with the OVS operator for subscribers, it will not compete for independent video programming providers. Even as a new entrant, the OVS operator will be dominant as to independent video programming providers, because there are no incumbent alternatives.

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[59] See, e.g., U S West Comments at 12; USTA Comments at 17.

[60] See Comments of NLC et al. at 23-24.

[61] U S West Comments at 4-7.

[62] See NCTA Comments at 18.

Thus, it would be absurd to adopt a rule presuming that OVS carriage rates were reasonable,[63] when the Commission has no reason whatsoever to suppose that this would be true. In the absence of actual, robust competition, the Commission has only one alternative if it does not with to undertake a cost-of-service analysis of OVS: an objective criterion such as our proposed yardstick — actual carriage of independent video programming providers — provides the only plausible basis for even tentatively concluding that rates are reasonable.[64] Such a real-world test is the Commission's only alternative to the full-scale tariff-style analysis that the Commission, and the LECs, wish to avoid.[65]

3. OVS rules must require public disclosure of carriage rates and arrangements.

In protesting against public disclosure of carriage contracts, the LECs again systematically confuse independent video programming providers' contracts with the OVS operator's contracts for the programming that the OVS operator itself

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[63] U S West Comments at 6.

[64] NYNEX approaches this criterion when it invites the Commission "to gauge whether an OVS operator's rates effectively preclude" access by independent video programming providers. NYNEX Comments at 23 (emphasis added). NYNEX, however, fails to draw the logical conclusion that the Commission's rules should incorporate a criterion based on actual results. Id. at 24.

[65] NCTA, curiously, seems to suggest that the cable rate regulation model might be used. NCTA Comments at 18. It suffices at this point to note that there is no set of competitive OVS carriage contracts now in place from which a cable-like benchmark could even in principle be extracted.

selects and provides over the system.[66] It is the latter, not the former, that could be compared with existing cable programming contracts.[67]

Some LECs argue that disclosure of carriage contracts could cause competitive harm.[68] Again, such an objection confuses the relevant markets, since the OVS operator has no competitor for carriage contracts. Moreover, there will be no competitive disadvantage as long as all OVS operators are subject to the same requirement.

IV. OPEN VIDEO SYSTEMS MUST MEET LOCAL COMMUNITY NEEDS AND INTERESTS.

1. OVS Operators Must Meet Locally Established PEG Requirements.

Bell Atlantic et al. suggest that the Act gives the Commission "great latitude" to keep OVS operators from having to comply with local public, educational, and governmental ("PEG") requirements. This is nothing more than wishful thinking by the LECs. The language of the Act is specific: an OVS operator's

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[66] See, e.g., Bell Atlantic Comments at 23 (the "minor exception of leased access" is precisely the one case roughly analogous to OVS carriage); USTA Comments at 12-13, 16; U S West Comments at 7; NYNEX, 13.

[67] Cf. Comments of Viacom, Inc. at 14 (April 1, 1996) ("Viacom Comments") (recognizing that programming contracts are distinct from carriage contracts). It should also be noted that even cable programming contracts are subject to disclosure where this is required by the public interest. See, e.g., 47 C.F.R. § 76.938.

[68] See, e.g., USTA Comments at 16.

PEG obligations shall be "no greater or lesser" than those contained in the PEG provision of the Cable Act (Section 611).[69] NYNEX, to its credit, seems to admit as much.[70] Thus, as indicated in our initial comments, a "match or negotiate" option should be made available to OVS operators.

It must be kept in mind that PEG requirements are established by localities "to meet critical localism goals."[71] These goals were recognized by Congress in the Cable Act. As NCTA points out, "[t]he local franchising authority is the governmental entity best positioned to appreciate community needs and most experienced in the implementation of PEG access rules."[72]

2. An OVS operator's PEG obligations extend to channel capacity, services, facilities, and equipment.

NYNEX suggests that an OVS operator could be exempted from the full PEG obligations of a competing cable operator by limiting those obligations to channel capacity alone, and not to the facilities, services, and equipment that are crucial to PEG operations.[73] Such an exemption obviously would defeat the

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[69] 1996 Act, section 302 (adding new 47 U.S.C. § 573(c)(2)(A)) (emphasis added).

[70] NYNEX Comments at 17. The issue of how those obligations should be met, id., has been addressed in our initial comments.

[71] Cablevision Comments at 21.

[72] NCTA Comments at 34.

[73] NYNEX Comments at 17 n.42.

purposes of the statutory provision — to equalize the benefits provided to communities by cable and OVS operators and the burdens such competing operators assume in partial compensation for their use of the public rights-of-way. Moreover, it would ignore the fact that the various kinds of PEG support negotiated in cable franchises, such as feeder links upstream to the headend, program production assistance, and video equipment, are essential if a community is to make effective use of PEG channel capacity.

But in addition, NYNEX's contention is not supported by the language of the Act. The OVS provision requires an OVS operator to fulfill the obligations of section 611 (47 U.S.C. § 531), without restriction. Those obligations include the franchise provisions regarding services, facilities, and equipment for PEG use that are incorporated by way of subsection 611(c), in addition to the channel capacity discussed in subsection 611(a). If Congress had intended the OVS operator to match only the obligations of subsection 611(a), it could have specified that subsection, as it did in the preceding subparagraph with section 623(f). Thus, Congress clearly intended to place the OVS operator on a par with the cable operator as to the <u>entire</u> set of PEG obligations embodied in Section 611, not merely channel capacity under 611(a). If an OVS operator were exempted from other types of PEG obligations, its obligations would be "lesser"

in comparison to those of the cable operator. Such a result is forbidden by subsection (c)(2)(A) of the OVS provision.[74]

3. Local PEG channels must be available to all subscribers by individual franchise area.

Bell Atlantic et al. advance in their comments a proposal for "generic PEG" without reference to specific local needs and interests. This proposal has already been refuted in our initial comments.[75] Similarly, NYNEX suggests that where there is no cable operator, the Commission should arbitrarily assign "a reasonable amount of capacity" for PEG purposes.[76] As indicated in our initial comments, however, only the local community can determine what PEG requirements are reasonable for that locality.

U S West alleges technical problems in connection with the delivery of PEG channels to specific franchise areas within an OVS operator's system.[77] As pointed out in our initial comments, however, this claim is specious.[78] But we welcome the opportunity apparently suggested by U S West to "work out

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[74] We endorse the reply comments of the Alliance for Community Media on this issue.

[75] See Bell Atlantic Comments at 27; Comments of NLC et al. at 39-41.

[76] NYNEX Comments at 17.

[77] U S West Comments at 18. See also Bell Atlantic Comments at 27.

[78] NLC et al. comments at 40-41. See also Time Warner Comments at 25; Cablevision Comments at 22 (cable operators already meet these requirements).

solutions on a system-by-system basis in cooperation with local franchising authorities."[79]

4. An OVS operator's PEG obligations must develop with those of competing cable operators.

NYNEX seeks to avoid the obligation to update an OVS operator's PEG requirements to parallel the changing obligations of competing cable systems.[80] NYNEX suggests no rationale, however, as to why the Commission can or should override the Act in this respect. The statutory requirement that the OVS operator's obligations be "no greater or lesser" than the cable operator's has no time limit. Congress was certainly aware that PEG requirements change over time, given the renewal provisions of the Cable Act. Had Congress wished to enact NYNEX's rule, the statute would read "initially no greater or lesser." Since it does not, the OVS operator's obligation must be a continuing one.

V. CABLE OPERATORS SHOULD NOT BE PERMITTED TO BECOME OVS OPERATORS, BUT IF THEY ARE, SEPARATE AND PRIOR LOCAL APPROVAL WILL BE NECESSARY.

A. A Cable Operator Cannot Be An OVS Operator.

Both LECs and cable operators appear generally to believe that the Commission could allow cable operators to become OVS operators. When tested against the statutory, contractual, and

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[79] U S West Comments at 18.
In addition, we endorse the suggestion of Time Warner Cable that the Commission adopt a rule prohibiting "redlining" by OVS operators. Time Warner Comments at 25-26.

[80] NYNEX Comments at 17 n.43.

policy-related issues raised in our initial comments, however, these arguments fail.[81]

(1) Statutory language. The OVS provision not only uses different language — a LEC may "provide cable service" over an OVS, but a cable operator, like any other person, may only "provide video programming" — but goes to the trouble of constructing two separate sentences to describe the respective roles of (a) the LEC and (b) everyone else. The only plausible reason for this distinction is that only a LEC, not a cable operator or any other person, may be an OVS operator.[82]

In fact, the statutory language distinction between LECs, on the one hand, and cable operators and any other person, on the other hand, dooms any suggestion that anyone other than a LEC may be an OVS operator. By stating that LECs may "provide cable service" over an OVS, while cable operators and others may provide only "video programming" over an OVS, Congress recognized that the combination of distribution facilities ownership and providing video programming was "provid[ing] cable service," while providing "video programming" on distribution facilities

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[81] See Comments of NLC et al. at 46-50; Comments of the Electronic Industries Association, Consumer Electronics Manufacturers Association, and Consumer Electronics Retailers Coalition at 6-9 (April 1, 1996); Comments of Tandy Corporation at 2-4 (April 1, 1996).

[82] As noted in our initial comments at 47-48, cable operators were mentioned specifically as video programming providers because of earlier disputes regarding whether cable operators could lease capacity on video dialtone systems. See, e.g., Bell Atlantic Comments at 15-16.

owned by someone else (the LEC) was not.[83] This construction is confirmed by the fact that Congress had to specifically exempt OVS operators from certain provisions of Title VI. Such an exception would be unnecessary, of course, if owning distribution facilities and providing video programming did not transform an OVS operator into a cable operator fully subject to Title VI, but for the exceptions in the OVS provision.

What this means is that only LECs can provide "cable service" — i.e., own the facilities and provide video programming — over an OVS. Cable operators — and any other persons — may not provide "cable service" over an OVS, because they may not own an OVS distribution system or be an OVS operator.[84]

(2) Contractual issues. A cable operator is contractually bound by its franchise agreement to provide cable service over a cable system. If such a cable operator sought to convert its

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[83] Thus, "cable service" is also defined to include subscriber interaction to select or use video programming, where such interaction is with the facilities operator, not the ultimate program provider.

[84] For this reason, Congress uses "video programming" to describe an OVS operator's offering at a point before the LEC has elected whether to use OVS, as in 47 U.S.C. §§ 571(a)(4) and 571(a)(3) (discussing the process of election itself). Similarly, Congress uses "video programming" rather than "cable service" in general descriptions of service that may be provided either by the OVS operator (cable service) or by other parties through the OVS system (as in 47 U.S.C. § 573(b)). In effect, the attempts in ACE Comments at 22-24, and TCI Comments at 23, to conflate the language in several statutory provisions fail because "video programming" is a broader term than "cable service" (as is briefly acknowledged in ACE Comments at 24 n.44). In any case, the conscious use of differing language in parallel sentences in the eligibility section of the OVS provision is clearly more significant for defining who is eligible to be an OVS operator than is any usage elsewhere.

cable system to an OVS (as distinct from offering the same programming over a competing OVS), it would lose all right to be in the public rights-of-way. It would also deprive the local government of its contractual rights under the franchise, creating a takings claim against the Commission if such an action were taken under color of Commission rules.[85]

(3) Policy rationale. As pointed out in our initial comments, Congress introduced OVS to provide an additional mode through which LECs could enter the video market to compete with established cable operators. This rationale, of course, does not apply at all to cable operators. On the contrary, the conversion of a cable system into an OVS would leave the community still with a single, monopolistic distribution facility, and no new channel capacity, yet deprived of all of the protections afforded by Title VI.[86]

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[85] Comments of NLC et al. at 49-50.

Viacom points out that "[a] cable operator that chooses to transform its service to OVS should not, of course, be permitted to use that change to abrogate its existing contracts with any of its programmers." Viacom Comments at 7 n.12. Viacom appears to forget that for the same reason a cable operator also cannot, of course, be permitted to abrogate its contract with the local franchising authority.

[86] It is clear from the comments that cable operators do not contemplate building new OVS systems if they are allowed to choose that option, but rather simply relabelling their existing cable systems as OVS. See, e.g., ACE Comments at 4; Comments of Cox Communications, Inc. at 4 n.4 (April 1, 1996); Comments, Comcast Cable Communications Inc., at 2; Viacom Comments at iv, 7 n.12. The single exception appears to be TCI, which refers to the possibility of a second open video platform. TCI Comments at 24.

Some cable operators have suggested that they must be allowed to become OVS operators under the First Amendment.[87] Such a suggestion, however, reflects a fundamental confusion about the opposite case — the LECs' earlier challenges to the former telco-cable cross-ownership ban. The telco-cable ban prohibited LECs altogether from selecting programming on their own systems, leaving them no alternative means to transmit their own programming. Cable operators, however, hardly need to be OVS operators to transmit their own programming; they are already able to select essentially all the programming on their own systems. Thus, they would gain no advantage in terms of transmitting their own speech (speech they select) if they had been allowed to become OVS operators. To the contrary, properly construed, OVS would give cable operators less capacity to transmit their own programming. Moreover, as discussed above, the governmental interest in competition provides a rationale for restraining cable operators from being OVS operators that, once again, had no exact parallel in the telco-cable cases.

If the Commission were to conclude that a cable operator may become an OVS operator at all (with the consent of its contractual partner, the local franchising authority), a cable operator could only be permitted to do so in those telephone service areas where it is also a LEC. This follows from the fact that even traditional LECs may become OVS operators only in their

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[87] See, e.g., ACE Comments at 24; Cablevision Comments at 36.

telephone service areas.[88] It would make no sense for a cable operator to have a wider scope for OVS than the telephone companies for which OVS was designed.

B. A Cable Operator May Provide Programming Through An OVS, But Only If Consistent With Its Cable Franchise and the Public Interest.

The danger of collapsing potential competition into a new consolidated monopoly is reflected in LECs' arguments that they should be able to refuse carriage to local cable operators.[89] None of the comments appear to address the concerns raised in our initial comments.[90]

VI. THE OVS CERTIFICATION PROCESS MUST ENSURE THAT AN OVS COMPLIES WITH LOCAL RIGHTS REGARDING THE PUBLIC RIGHTS-OF-WAY.

A. The Act Neither Preempts, Nor Authorizes the Commission To Preempt, State and Local Authority Over the Public Rights-of-Way.

Some LECs argue that the OVS provision somehow preempts state and local authority to manage and to receive fair

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[88] See 1996 Act, section 302(a) (adding new 47 U.S.C. § 573(a)(1)) ("A local exchange carrier may provide cable service to its cable service subscribers in its telephone service area through an open video system") (emphasis added). This limitation in turn flows from the fact that the Act established the four regulatory options for LECs in the course of removing the telco-cable restriction and encouraging LECs to enter the video market within their service areas. LECs, of course, always had the option of being cable operators outside their telephone service areas.

[89] See, e.g., Bell Atlantic Comments at 15; NYNEX Comments at 11.

[90] Comments of NLC et al. at 51-52.

compensation for the use of their public rights-of-way.[91] These arguments simply represent the high-water mark of the LECs' attempt unilaterally to expand their rights while evading the associated responsibilities. Not only do these arguments lack any support in the statute; in addition, their acceptance in Commission rules would trigger massive Fifth Amendment litigation, delaying the OVS experiment indefinitely for the sake of an essentially frivolous argument.

B. The Act Does Not Expressly Preempt State and Local Right-of-Way Authority.

Neither Title VI, nor the new OVS provision, makes any reference to preempting any state or local requirement to obtain a franchise or similar authorization to use local public property not belonging to the federal government.[92] Rather, Title VI merely adds a federal law franchising requirement; it does not take any franchising requirement away. The OVS provision simply exempts OVS operators from that federal requirement.

The OVS statutory provisions work within federal law alone; they contain no reference to right-of-way authority under state or local law. Section 573(c) merely exempts an OVS from parts of Title VI (itself only a federal law requirement), substituting the new federal regulations now under consideration. But exempting OVS from the federal requirement for a local cable

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[91] See Bell Atlantic Comments at 4-5, 32; NYNEX Comments at 30-32.

[92] See Jones v. Rath Packing Co., 430 U.S. 519, 97 S. Ct. 1305 (1977) (Congress must clearly authorize express preemption).

franchise in Title VI has no effect whatsoever on any state or local requirement for right-of-way authorization.

The distinction between the federal law and the parallel state or local law may be illustrated by analogy. There is no question that the Commission has plenary authority over interstate communications by wire under Title II, and over broadcasting under Title III. Yet no one could seriously claim that a Section 214 authorization granted by the Commission, or a Title III broadcast license issued by the Commission, preemptively entitles the holder to install facilities on property that does not belong to it.

The OVS provisions are certainly no more preemptive than Title II or III. On the contrary, in the case of OVS, Congress has made clear that its intent is not to preempt local authority with respect to management of the rights-of-way. The legislative history of the OVS provision states:

> The conferees intend that an operator of an open video system under this part shall be subject, to the extent permissible under state and local law, to the authority of the local government to manage its public rights-of-way in a nondiscriminatory and competitively neutral manner.[93]

Thus, no express preemption may be alleged.

C. The Act Does Not Impliedly Preempt State and Local Right-of-Way Authority.

Sensing that Congress did not expressly preempt state and local right-of-way authority over OVS, the LECs try to argue that

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[93] H.R. Rep. No. 458, 104th Cong., 2d Sess. 178 (1996).

preemption is implied. Such implied preemption could occur in only two ways: either by actual conflict between federal and state or local law,[94] or by an expression of congressional intent to preempt an entire field of regulation.[95] Neither is applicable here.

1. The OVS provision is not inconsistent with state or local law.

The LECs present no argument suggesting that it would be impossible for them to comply with both federal and state or local requirements, and thus that an actual conflict exists. Certainly LECs would prefer not to have to comply with both requirements, but that is no basis for preemption. In fact the two levels of law here are complementary, not contradictory. Federal licensing of an entity to provide an interstate communications service is entirely consistent with state or local authorization to use and occupy the public rights-of-way. Just as federal OVS licensing does not excuse a LEC from having to obtain office space or purchase equipment for its system, so it does not excuse the LEC from having to lease the public rights-of-way it wishes to use.

In order for the LECs to have a viable claim of impossibility, the FCC would have to point to a specific local requirement that makes compliance with OVS statutory requirements

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[94] See Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699, 104 S.Ct. 2694, 2700 (1984).

[95] See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 67 S.Ct. 1146 (1947).

or Commission regulation an impossibility.[96] They have presented no such claim.[97]

2. The OVS provision does not purport to occupy an entire field of regulation.

NYNEX argues that the OVS provision preempts the field of regulation — in other words, Congress legislated in an area "comprehensively with an intent to occupy an entire field of regulation and has left no room for States to supplement federal law."[98]

NYNEX's "preempt the field" argument is misguided. As an initial matter, no such regulatory intent to exclude all state regulation is evident in Section 573. On the contrary, as noted above, the legislative history makes clear that Congress expected state and local governments to retain a role with respect to OVS.

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[96] See Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 147, 83 S.Ct. 1210, 1218 (1963). Cf. NARUC v. FCC, 880 F.2d 422, 431 (D.C. Cir. 1989) (FCC may preempt state regulation only to the extent it thwarts achievement of valid federal policy).

[97] For the same reason, the LECs cannot argue that local authority should be preempted in accordance with the preemption test of Hines v. Davidowitz, which permits preemption of state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941)). Indeed, other than their preference to avoid local requirements, LECs present no evidence that meeting local requirements would stand as an obstacle to OVS. If it did, LECs could always seek solace in the barrier-to-entry provision in the new Act. (codified at new 47 U.S.C. § 253).

[98] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 234, 67 S.Ct 1146, 1154 (1947).